U.S. Department of Labor

Office of Administrative Law Judges
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Date: August 23, 2000

Case Nos.: 1999-LHC-2077

OWCP Nos.: 5-105519

In the Matter of:

PERRY J. MOON,
Claimant,

v.

TIDEWATER CONSTRUCTION COMPANY,
Employer.

Appearances:

Gregory E. Camden, Esq.
For the Claimant

Henry P. Bouffard, Esq.
For the Employer

Before: DANIEL A. SARNO, JR.
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim under the Longshore and Harbor Workers' Compensation Act ("the Act"), as amended, 33 U.S.C. §§ 901 et seq. A hearing was held in this case on April 4, 2000, in Newport News, Virginia. At the hearing, the Employer offered Exhibits EX-1[1] and EX-6, and the

[1] The following citations will be used as citations to the record:
CX - Claimant's Exhibits
EX - Employer's Exhibits
ALJX - Administrative Law Judge Exhibit

Claimant CX-1 and CX-13. The parties jointly offered signed stipulations as ALJX-1. All were admitted into evidence. Both the Employer and the Claimant filed briefs. All parties were afforded a full opportunity to present evidence and argument by submission of exhibits and briefs, as provided by law and applicable regulations. The findings and conclusions which follow are based on a complete review of the entire record in light of the arguments of the parties, applicable statutory provisions, regulations, and pertinent precedent.

STIPULATIONS

The parties stipulated to, and I find that:

1. The Employer and Claimant were involved in an employer/employee relationship at the time of the injury.

2. The Claimant was accidentally injured on July 24, 1997, arising out of and in the course of her employment.

3. The applicable average weekly wage is $651.42, resulting in a compensation rate of $434.32.

4. That as a result of this injury, Claimant suffered injuries as follows: closed concussion, shoulder injury, right leg injury, multiple fractures to the face, right eye injury, hip and sacrum fractures, crushed right toe and fractured rib.

5. That Employer paid Claimant voluntarily under the Virginia Workers' Compensation Act the following benefits: temporary total disability benefits from July 25, 1997, to November 30, 1997; February 9, 1998, to August 31, 1998; and January 6, 1999, to January 19, 1999, and permanent partial disability rating in the amount of 8.75 weeks.

6. Should the Claimant be awarded benefits, the Employer is entitled to a credit for benefits paid under the Virginia Workers' Compensation Act.

7. That Claimant timely filed a notice of injury with the exception of the neck and back.

8. That Claimant filed a timely claim.

9. The Employer timely filed a First Report of Injury.

10. That Employer file a timely Notice of Controversion.

Br. - Brief
Tr. - Hearing transcript

ISSUES

1. Was the Claimant injured on a situs covered under the Act?

2. Did the Claimant have status under the Act by performing maritime employment?

3. Are Claimant's neck and back injuries due to his work related accident on July 24, 1997?

FINDINGS OF FACT REGARDING JURISDICTION

1. Tidewater Construction Company (Tidewater) is a construction company that has an industrial division which builds facilities such as paper mills, power plants and warehouses. Tidewater is not in the business of repairing or building ships. Nor is it in the business of repairing or maintaining equipment used in the loading or unloading of ships. Moreover, it is not in the business of loading or unloading ships (Tr.76). In November 1996, the industrial division of Tidewater was awarded a bid by the United States Navy to build a controlled industrial facility (warehouse project) at the Norfolk Naval Base in Norfolk, Virginia (Tr.75-76, 83). The Norfolk Naval Base is gated (Tr.77.). Even individuals, such as private construction workers, must have badges to enter the base and get to and from their respective construction sites (Tr.82-83). Tidewater was to build a concrete warehouse or storage building on the base about 75- 200 yards from piers used by the Navy ships and submarines (Tr.9, 77, 81-82). The building was to be used by the Navy to store spent nuclear fuel transported to that building by truck from the nuclear surface ships and/or nuclear submarines at the piers (Tr.10-11, 80-82). During the construction of the building by Tidewater, no spent nuclear fuel was ever transported to the building. Not until the project was completed and the building turned over to the Navy was it used for any purpose (Tr.84-85). The only thing between the building being constructed and the piers was a parking lot used by the Navy personnel assigned to the ships and submarines (Tr.13-14). At all times during the construction of the building, access to the piers was off limits to Tidewater personnel (Tr.82). Construction began in January 1977 and was completed in October 1998 (Tr.84).

2. Claimant was hired by Tidewater as a carpenter sometime in late June or early July 1997 (Tr.8, 28). He was assigned to work on the building at the Navy base constructing wooden forms used in constructing concrete walls (Tr.10, 29). He had been working on the project approximately three weeks when he suffered his injury on July 24, 1997 (Tr.28). Claimant had no involvement in either the repairing, building, loading or unloading

of ships (Tr.30-31). Claimant agreed that his involvement with the project would have ended once he had completed constructing the forms for the concrete walls (Tr.31).

CONCLUSIONS OF LAW

In order to make a claim under the Act, a claimant must meet both the status and situs requirements of coverage. Specifically, the Act requires that the claimant be an "employee" as defined by the Act (status), and that the injury occur within a geographical area covered by the Act (situs). Section 2(3) of the Act[2] defines status while Section 3(a)[3] defines situs.

Situs

In this case, the injury occurred during the construction of a concrete building located inland at the Norfolk Naval Base. Therefore, the injury did not occur over the navigable waters of the United States. It is left to decide whether the injury occurred on "any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by any employer in loading, unloading, repairing, dismantling, or building a vessel." 33 U.S.C. § 903(a) (emphasis added).

The Fourth Circuit interpreted "other adjoining area" in Sidwell v. Express Container Servs., 29 BRBS 138 (CRT) (4th Cir. 1995). In that case, the employee was injured while working at a facility eight-tenths of a mile from the employer's shoreside terminal. Id. at 139. The facility was

> surrounded by businesses and residential developments, including a sheet metal shop, a paint contractor, a row of houses, an engraving shop, a heating and air-conditioning contractor, a gas station, a fire station, a container yard, a Nissan-owned storage area, a foundry, a wholesale meat distributor, a painting and sandblasting contractor, a railroad yard, and a large residential area across the highway.

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[2] "The term employee means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . . ." 33 U.S.C. § 902(3). Section 2(3) also lists exceptions to this definition, none of which are at issue in this case.

[3] "Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 U.S.C. § 903(a).

Id. In holding that these facts precluded a finding of situs, the Fourth Circuit stated that an area "adjoins" navigable waters only if it is "'contiguous with' or otherwise 'touches' such waters." Id. at 143. "If there are other areas between the navigable waters and the area in question, the latter area simply is not 'adjoining' the waters under any reasonable definition of that term." Id. An "area" is a "discrete structure or facility, the very raison d'etre of which is its use in connection with navigable waters." Id. Furthermore, "it is inescapable that some notion of property lines will be at least relevant, if not dispositive, in determining whether the injury occurred within a single 'other adjoining area.'" Id. Finally, the Sidwell Court added that "it is the parcel of land that must adjoin navigable waters, not the particular square foot on that parcel upon which a claimant is injured." Id. at n.11. In Parker v. Director, OWCP, 30 BRBS 10, 12 (CRT) (4th Cir. 1996), the Fourth Circuit elaborated on this notion and expressly stated that situs would lie "if the injury occurs within the boundaries of a marine terminal that is contiguous with navigable waters."

The Benefits Review Board (the "Board") applied Sidwell when it denied situs in Kerby v. Southeastern Pub. Serv. Auth., 31 BRBS 6 (1997). In Kerby, a power plant built to serve the naval shipyard, and sitting on land owned by the Navy, was separated from the shipyard by a "private railroad spur" and "chain link fence." Id. at 10. Additionally, personnel from the power plant could not move freely to the terminal without a pass. Id. at 11. The Board held that these circumstances showed that there was a "clear separation of the two parcels of land." Id. at 10.

In two other recent cases, the Board focused on the separation of parcels of land by public streets and fences. In Griffin v. Newport News Shipbuilding and Dry Dock Co., 32 BRBS 87, 89 (1998), the Board held that because the parking lot in question "is physically separated from employer's shipyard by a public street as well as a security fence, it must be deemed to be a separate and distinct piece of property rather than part of the overall shipyard facility." Similarly, in McCormick v. Newport News Shipbuilding and Dry Dock Co., 32 BRBS 207, 209 (1998), the claimant was injured at a site separated from the shipyard by public roads and security fences. The Board quoted Griffin and held that "since Building 511 is a separate and distinct parcel of land, it cannot be considered an 'adjoining area' under Section 3(a)." Id.

From this discussion, I conclude that the Claimant was injured on a situs covered by the Act. The injury occurred at the Norfolk Naval Base, which requires a person to pass through a security gate. Moreover, even construction workers were required to have badges to get to and from their respective work sites. The building itself beside being inside the Navy Base is separated form the piers by only a parking lot. Moreover, the building's "raison d'etre" is the storage of spent nuclear fuel coming from various nuclear powered ships located at the nearby piers. Sidwell and Parker expressly stated that an injury within the confines of a maritime "adjoining area" will confer situs. See Sidwell, 29 BRBS at n.11 ("it is the parcel of land that must adjoin navigable waters, not the particular square foot"); see also Parker, 30 BRBS at 12 ("situs test may be satisfied if the injury occurs within the boundaries of a marine terminal that is contiguous with navigable waters"). Therefore, I conclude that building in question is located on an adjoining is a covered situs.

The fact that the building stands approximately 75-200 yards from the water and piers does not alter the outcome. The entire base is one secure maritime site within whose confines the building is located.

Badges are needed just to get on the base. Also, the Navy owns all of the property on the base. From these facts, I conclude that the whole depot is one "discrete facility," of which the building is a part. I find that the building is a covered situs under the Act. See Parker, 30 BRBS at 12.

Status

The Employer argues that the Claimant has no status as an "employee" under the Act because he was not engaged in any maritime employment or longshoring activities.

In Northeast Marine Term. Co. v. Caputo, 432 U.S. 249, 266-67, the Supreme Court stated that when Congress amended the Act in 1972 it indicated an "intent to cover those workers involved in the essential elements of unloading a vessel taking cargo out of the hold, moving it away from the ship's side, and carrying it immediately to a storage or holding area." Caputo took "an expansive view of the extended coverage." Id. at 268. Employment is maritime if it is "clearly an integral part of the unloading process;" maritime workers must "spend at least some of their time in indisputably longshoring operations." Id. at 271, 273.

The Employer has noted that the Claimant handled no cargo, nor performed any work concerning ships at all, which the Claimant does not deny. However, "[l]and-based workers who do not handle containerized cargo may be engaged in loading, unloading, repairing, or building a vessel." P.C. Pfeiffer Co. v. Ford, 444 U.S. 69, 80 (1979). In applying Caputo, Ford defined maritime employment as workers "moving cargo directly from ship to land transportation." Id. at 82. The Supreme Court repeated this formulation in Herb's Welding v. Gray, 470 U.S. 414, 424 (1985), when it stated that a worker must be "actually involved in moving cargo between ship and land transportation." Finally, in Chesapeake & Ohio Ry. v. Schwalb, 493 U.S. 40, 47 (1989), the Court stated that the Act "is not limited to employees who are denominated 'longshoremen' or who physically handle cargo."

In this case, the Claimant has argued that his job was an "integral or essential part of the chain of events leading up to the storing of spent nuclear fuel offloaded from nearby nuclear powered vessels. The record does not support the Claimant's theory. First, the Claimant had nothing to do with unloading any naval vessels or the storing of the spent nuclear fuel. Second, and more importantly, the Claimant never worked at the facility while it was in operation, but rather during its construction. A similar set of facts arose in Weyher/Livsey Constructors v. Prevetire, 28 BRBS 57 (CRT) (4th Cir. 1994). In Prevetire, a welder was injured while constructing a power plant whose purpose was to provide energy to the U.S. Navy for use at its base in Norfolk, Virginia.[4] The Fourth Circuit rejected the Claimant's argument that he had status as a maritime employee. "The maritime activities of Prevetire . . . barely extended beyond 'breathing salt air.'" Id. at 62. "Obviously, if the plant had been built just outside the shipyard's boundary rather than just inside it (or if the electricity generated by the plant had been consumed outside the shipyard, Prevetire's job would not have changed one iota." Id. "Indeed, it is difficult to imagine how any employee

[4] This is the same power plant whose situs was at issue in Kerby, supra.

working full-time at the Norfolk Naval Shipyard could be deemed non-maritime if Prevetire, the shipyard power-plant builder, were classified as a maritime employee." Id. at 63. The Court also noted that Prevetire was employed in "only the construction of a power plant (as distinguished from its later operation or maintenance)." Id. at 62 (emphasis in original).

Prevetire determines the outcome of this claim. Claimant worked as a carpenter in the construction of wooden forms used to construct cement walls for a building which would eventually receive spent nuclear materials unloaded from naval vessels. The storing of nuclear materials would not take place until the building was transferred over to the Navy after the completion of the project. Claimant's involvement with the later offloading and subsequent storage of spent nuclear fuel is simply to tangential to consider him to be given status as a covered "employee" under the Act. Therefore, if status does not lie under Prevetire, it cannot lie here, either. Thus, since the Claimant did not perform covered employment under the Act, the claim must be denied.[5]

ORDER

It is hereby ORDERED that the claim for benefits is DENIED.

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DANIEL A. SARNO, JR.
Administrative Law Judge

DAS
Newport News, Virginia

[5] Because the Claimant did not prevail in this claim, the Act prohibits Claimant's counsel from receiving attorney's fees from any party. U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 718 (1990) (citing with approval Director, OWCP v. Hemingway Transport, 1 BRBS 73, 75 (1974) ("The effect of Section 28 is to condition fees for claimant's attorneys on the success of a claim."); Ingalls Shipbuilding v. Director, OWCP, 991 F.2d 163, 27 BRBS 14, 16 (CRT) (5th Cir. 1993) ; Murphy v. Honeywell, Inc., 20 BRBS 68, 70 (1986) ("Attorney's fees may not be awarded for services rendered before a given tribunal unless the claim has been ``successfully prosecuted," i.e., unless additional benefits have been awarded by that tribunal or on appeal from that tribunal."); see also 33 U.S.C. § 928(e).